

**UNITED STATES
NUCLEAR REGULATORY COMMISSION
ATOMIC SAFETY AND LICENSING BOARD**

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In re: Docket Nos. 50-247-LR; 50-286-LR

License Renewal Application Submitted by ASLBP No. 07-858-03-LR-BD01

Entergy Nuclear Indian Point 2, LLC, DPR-26, DPR-64
Entergy Nuclear Indian Point 3, LLC, and
Entergy Nuclear Operations, Inc. December 7, 2013
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**STATE OF NEW YORK
MOTION TO REOPEN THE RECORD
AND FOR RECONSIDERATION
ON CONTENTION NYS-12C**

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The State of New York respectfully requests that the Atomic Safety and Licensing Board reopen the hearing record on Contention NYS-12, consider the evidence presented by the State, and reconsider its recent ruling in light of information that NRC Staff used a TIMDEC input value of 365 days in a MACCS2 analysis of a severe accident at a spent fuel pool. This development is contrary to the position taken by the NRC Staff and Entergy before the Board in this proceeding that the NRC Staff had consistently accepted and used TIMDEC inputs of 60 days and 120 days for the last 30 years. The record in this proceeding establishes that had the Staff used a TIMDEC value of 365 days in the MACCS2 analysis for the Indian Point license renewal application at least one additional severe accident mitigation alternative (SAMA) candidate could become cost beneficial.

The State presents this motion pursuant to 10 C.F.R. §§ 2.326 and 2.323(e) and the Board's inherent authority to ensure fairness and due process in this proceeding. NRC Staff and Entergy oppose the motion.

Factual and Procedural Background

The facts supporting the State's motion are set forth in the accompanying declarations of Assistant Attorney General John Sipos and Timothy Mahilrajan of International Safety Research, Inc. ("ISR"), and the additional attachments, which consist of various NRC documents and communications between the State and NRC [Attachments 1-7]. Briefly stated, as a result of the State's participation in other matters, it has learned that in late 2012 the NRC Staff used a single TIMDEC input of 365 days in a MACCS2 analysis of the consequences of a severe accident at a spent fuel pool. In that 2012 MACCS2 analysis, NRC Staff employed the 365 day TIMDEC input for both the light decontamination (DF=3) and the heavy decontamination (DF=15) scenarios. Moreover, in conducting the MACCS2 analysis for the spent fuel pool consequence

study, NRC consulted with the same Sandia National Laboratories staffers who supported and testified on behalf of the Staff in this proceeding – Dr. Bixler and Mr. Jones.

On November 27, 2013 the Atomic Safety and Licensing Board issued a partial initial decision on the Track 1 contentions in this proceeding. LBP-13-13. Among other things, the Board decided Contention NYS-12 in favor of NRC Staff (*id.* at 260-294) and “close[d] the record for the Track 1 contentions.” (*id.* at 389). The issue of MACCS inputs, including TIMDEC, was an issue of dispute and litigation in the proceeding. Throughout their testimony and post-hearing briefing, NRC Staff and Entergy represented that the Staff had consistently used 60 days and 120 days for TIMDEC inputs for light and heavy decontamination. As far as the State can determine, Staff did not disclose the 2012 MACCS2 analysis or files in this proceeding, nor did it mention it in its post-hearing arguments to the Board.

The State initiated consultation on December 5. NRC Staff and Entergy oppose the motion; Riverkeeper does not oppose; Clearwater takes no position.

Legal Framework

Motion to Reopen the Record. 10 C.F.R. § 2.326(a) permits the record to be reopened if the motion (1) is timely, (2) addresses a significant environmental (or safety) issue; and (3) demonstrates that a materially different result would have been likely had the newly-proffered evidence been considered initially. Such motion should be accompanied by affidavits setting forth the factual or technical bases for the movant’s request and present evidence that is admissible. 10 C.F.R. § 2.326(b). (Before the revision and organization of NRC regulations, the applicable regulation for reopening was § 2.734.)

Hearings may be reopened, in appropriate situations, either upon motion of any party or *sua sponte*. *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station),

ALAB-124, 6 A.E.C. 358 (1973). A Board may reopen the record when it becomes aware, from any source, of a significant safety issues or of possible changes in facts material to the resolution of major environmental issues. *See generally Commonwealth Edison Co.* (LaSalle County Nuclear Station, Units 1 & 2), ALAB-153, 6 A.E.C. 821 (1973); *Vermont Yankee Nuclear Power Corp.* (Vermont Yankee Nuclear Power Station), ALAB-124, 6 A.E.C. 358 (1973); *Georgia Power Co.* (Vogtle Nuclear Plant, Units 1 & 2), ALAB-291, 2 N.R.C. 404 (1975) (hearing may be reopened when a significant environmental issue is involved). Where factual disclosures reveal a need for further development of an evidentiary record, the record may be reopened for the taking of supplementary evidence. *Tennessee Valley Authority* (Hartsville Nuclear Plant, Units 1A, 2A, 1B & 2B), ALAB-463, 7 N.R.C. 341, 352 (1978). Reopening has been ordered where the changed circumstances involved a hotly contested issue. *Northern Indiana Public Service Co.* (Bailly Generating Station, Nuclear-1), CLI-74-39, 8 A.E.C. 631 (1974).

A movant may rely upon documents generated by the NRC Staff, *see Louisiana Power & Light Co.* (Waterford Steam Electric Station, Unit 3), ALAB-812, 22 N.R.C. 5, 17 & n.7 (1985), as well as on evidence that came into existence after the hearing closed. *Pacific Gas & Electric Co.* (Diablo Canyon Nuclear Power Plant, Units 1 & 2), ALAB-598, 11 N.R.C. 876, 879 n.6 (1980). Affidavits supporting a motion to reopen must demonstrate that a materially different result is likely, *i.e.*, the evidence supporting the motion to reopen would likely have materially altered the outcome of the proceeding. *AmerGen Energy Co., Inc.* (Oyster Creek Nuclear Generating Station), LBP-08-12, 68 N.R.C. 5, 22 *aff'd* CLI-08-28, 68 N.R.C. 658 (2008).

Motion for Reconsideration. 10 C.F.R. § 2.323(e) permits parties to seek reconsideration of a decision and set out the procedure and standards for such a request. Parties seeking reconsideration must file a motion seeking leave of the presiding officer and demonstrate

compelling circumstances, such as a material error, that render the underlying decision invalid. Such a motion must be filed within 10 days of the decision for which reconsideration is being sought. 10 C.F.R. § 2.323(e).

As with motions to reopen the record, Licensing Boards have the inherent power to entertain and grant a motion to reconsider an initial decision. *Consolidated Edison Co.* (Indian Point Nuclear Generating Unit 3), ALAB-281, 2 N.R.C. 6 (1975). Although some decisions hold that motions for reconsideration are not favored when premised on new evidence rather than errors in the existing record, at least one decision permitted reconsideration based on facts that were not adequately presented to the Board but were relevant to the particular issue under consideration and were potentially sufficient to change the result previously reached. *See, e.g., Private Fuel Storage, L.L.C.* (Independent Spent Fuel Storage Installation), LBP-98-17, 48 N.R.C. 69 (1998). The Commission has held that a motion for reconsideration is not lightly granted, but will be considered if a party seeking reconsideration brings decisive new information to its attention or demonstrates a fundamental Commission misunderstanding of a key point. *Pacific Gas and Electric Co.* (Diablo Canyon Power Plant Independent Spent Fuel Storage Installation), CLI-06-27, 64 N.R.C. 399, 340 n.6 (2006).

Disclosure. 10 C.F.R. § 2.336(b)(2),(3) requires NRC Staff to disclose documents that are relevant to an admitted contention. This standard includes documents that documents that support the Staff's position or testimony – and should also include documents that do not support the proposed action or are contrary to the Staff's position in the proceeding.

Argument

The Motion is Timely. The State presents this motion to the Atomic Safety and Licensing Board within 10 days of the Board's November 27 LBP-13-13 decision. In addition, the State sought to obtain and review the native format MACCS2 files. The State did not receive the native format files until November 26. Therefore, the motion is timely.

The Motion and the Proffered Evidence Concern a Significant Environmental Matter. In 1989, the U.S. Court of Appeals for the Third Circuit rejected NRC's position that it need not examine the environmental impacts of a severe accident in a licensing proceeding. *Limerick Ecology Action, Inc. v. NRC*, 869 F.2d 719, 739 (3d Cir. 1989). In response to the Third Circuit's *Limerick* decision, the NRC promulgated 10 C.F.R. § 51.53(c)(3)(ii)(L) requiring the examination of site specific severe accident mitigation alternatives (SAMA) for the applicant's plant. The MACCS2 code has been used for SAMA analyses and Contention NYS-12 challenged aspects of that analysis for Indian Point. The testimony and report of Dr. François Lemay demonstrated that TIMDEC played an important role in the MACCS2/SAMA analysis. Additionally, the Board's recent LBP-13-13 decision confirm that the issue of the TIMDEC input value was an important issue in Contention NYS-12. *See, e.g.*, LBP-13-13 at 283-288. Accordingly, the proffered evidence, which concerns the TIMDEC input, concerns an important issue.

The Proffered Evidence Could Have Affected the Outcome. A materially different result would have been likely had the newly-proffered evidence been disclosed and considered initially. NRC Staff and Entergy witnesses testified that NRC Staff have accepted and used the 60 and 120 day input values for light and heavy decontamination time, respectively, for 37 years. Their post-hearing presentations repeated that theme. However, one month after the hearing on

NYS-12 and before the submission of the post-hearing briefs to the Board, Staff used a 365 day TIMDEC input value for light decontamination and a 365 day TIMDEC input value for heavy decontamination as part of the MACCS2 analysis for a consequence study for a spent fuel pool accident prepared in connection with the Fukushima accident. While the State will not presume to state with certainty how the Board would have ruled had this information been disclosed in a timely manner, the proffered information runs directly counter to Staff's testimony and position.

The State respectfully submits that NRC's use of a 365 day (one year) value for the TIMDEC input in a MACCS2 analysis is relevant and material to the State's position on Contention NYS-12. As the Board is aware, in the Indian Point proceeding Entergy used, and Staff accepted, TIMDEC input values of 60 and 120 days for light and heavy decontamination, respectively. Among other challenges to the MACCS2 analysis, the State demonstrated that using a TIMDEC input value of 365 days would more than double the offsite economic cost risk ("OECR"). NYS000430 at 6, Table 13 (ISR analysis regarding a light decontamination scenario with a TIMDEC input of one year and a heavy decontamination scenario with a TIMDEC input of two years); Tr. 2205:20-2206:5(Lemay); State of New York's Proposed Findings of Fact and Conclusions of Law for Contention NYS-12/12A/12B/12C, at ¶ 269. Given the fact that Entergy testified that "at 11%, IP2 SAMA 025 has the smallest margin between the current benefit and the increased benefit to become cost effective," doubling the OECR would render at least one additional SAMA candidate cost-beneficial. It would also render existing cost-beneficial SAMA candidates more cost-beneficial.

Based on these facts, the State respectfully submits that it has satisfied the requirement that it demonstrate that a materially different result "would have been likely" had the newly proffered evidence been considered initially. 10 C.F.R. § 2.326(a)(3). For the same reasons, the

State also submits that it has demonstrated “compelling circumstances” supporting a motion for leave for reconsideration under 10 C.F.R. § 2.323(e).

Conclusion

Accordingly, the State of New York respectfully requests that the Atomic Safety and Licensing Board reopen the record, consider the evidence presented by the State and reconsider its decision in LBP-13-13 concerning contention NYS-12. In the alternative, the State respectfully requests that Board establish procedures for the discovery and presentation of additional evidence on this issue, and thereafter reconsider its decision in LBP-13-13 concerning contention NYS-12.

Respectfully submitted,

Signed (electronically) by

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December 7, 2013

10 C.F.R. § 2.323 Certification

Pursuant to 10 C.F.R. § 2.323(b) and the Board's July 1, 2010 Scheduling Order (at 8-9), I certify that I have made a sincere effort to contact counsel for NRC Staff, Entergy, Riverkeeper, and Clearwater in this proceeding, to explain to them the factual and legal issues raised in this motion, and to resolve those issues, and I certify that my efforts have been unsuccessful with respect to NRC Staff and Entergy. Riverkeeper does not oppose the motion and Clearwater takes no position.

Signed (electronically) by

John J. Sipos
Assistant Attorney General
State of New York

dated: December 6, 2013

List of Attachments

- Attachment 1 Declaration of Assistant Attorney General John Sipos, State of New York, December 6, 2013.
- Attachment 2 Statement of Timothy Mahilrajan, International Safety Research, Inc. ("ISR"), December 6, 2013.
- Attachment 3 Draft Report, Consequence Study of a Beyond-Design Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark I Boil Water Reactor, June 26, 2013 (ML13133A132) ("Spent Fuel Pool Consequence Study").
- Attachment 4 Official Transcript of Proceedings, Japan Lessons Learned Project Directorate, Public Meeting, September 18, 2013 (ML13277A215) ("9/18 Transcript") (Excerpt)
- Attachment 5 Various NYS & NRC communications re request for MACCS2 Input and Output Files for Spent Fuel Pool Consequence Study.
- Attachment 6 "Package Description" and various MACCS2 Input and Output Files for Spent Fuel Pool Consequence Study (with date of November 13, 2012)
- Attachment 7 NRC Staff SECY-13-0112, Consequence Study of a Beyond Design Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark 1 Boil Water Reactor, October 9, 2013 (ML13256A339) (posted on public ADAMS on October 22, 2013) & [Final] Consequence Study of a Beyond Design Basis Earthquake Affecting the Spent Fuel Pool for a U.S. Mark 1 Boil Water Reactor, October 2013 (ML13256A342) (posted on public ADAMS on October 23, 2013).